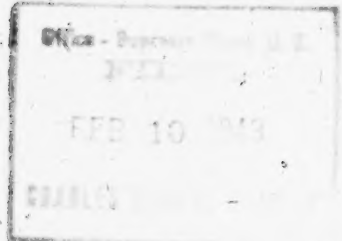


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IN THE
Supreme Court of the United States

October Term—1942

No.

721

1

THE NORTH AMERICAN COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT**

CHARLES E. HUGHES, JR.,
Counsel for the Petitioner.

SULLIVAN & CROMWELL,
Attorneys for the Petitioner.

February, 1943.

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THE NORTH AMERICAN COMPANY,	}
<i>Petitioner,</i>	
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SECURITIES AND EXCHANGE COMMISSION,	}
<i>Respondent.</i>	

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT**

The North American Company prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on January 28, 1943.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 4000) is unreported as yet. The Securities and Exchange Commission (hereinafter called the Commission) issued opinions and orders dated April 14, 1942

(R. 194) and June 25, 1942 (R. 214) as its Holding Company Act Releases Nos. 3405 and 3629, which are not yet officially reported.

STATUTE INVOLVED

The statute involved is Title I of the Public Utility Act of 1935 entitled "An Act to provide for control and regulation of public-utility holding companies, and for other purposes", 49 Stat. 803 (hereinafter called the Act). The orders of the Commission were entered under Section 11(b) (1) of the Act. A sufficient number of copies of the Act for the Court are filed with this petition.

JURISDICTION

The decree of the Circuit Court of Appeals for the Second Circuit sought to be reviewed was entered on January 28, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, made applicable by Section 24(a) of the Act.

QUESTIONS PRESENTED

1. Is Section 11(b)(1) of the Act within the power of Congress, under Article I, section 8, clause 3 of the Constitution, to regulate commerce among the several States?
2. Does Section 11(b)(1) of the Act violate the due process clause of the Fifth Amendment?

STATEMENT

The decree of the Circuit Court of Appeals of which review is sought affirmed two orders of the Commission.

The order of April 14, 1942 directs the petitioner to divest itself of all its assets other than securities of Union Electric Company of Missouri, except that the Commission reserved jurisdiction hereafter to enter an order directing petitioner to divest itself of securities of St. Louis County Gas Company and of 60 Broadway Building Corporation. The assets of which petitioner is ordered to divest itself cost it approximately \$190,000,000. The order of June 25, 1942 refused permission to the petitioner to choose for itself the integrated public utility system which it might retain.

The petitioner, a New Jersey corporation with its principal office in New York City, was organized in 1890 and has since continuously engaged in the business of acquiring and holding for investment stocks and other securities, principally in the electric utility field. It has no other business (R. 2084-5, 2807, 2925). It registered under the Act on February 25, 1937 (reserving its constitutional rights),* and is thus "a registered hold-

*See *Landis, et al. v. The North American Company*, 299 U. S. 248, 251-252 (1936); *Electric Bond & Share Co., et al. v. Securities and Exchange Commission, et al.*, 303 U. S. 419, 435 (1938).

ing company" within the meaning of Section 11(b)(1).

The investments of petitioner dealt with by the Commission's opinion, findings and order are set out in Appendix A hereto.

Petitioner's direct and indirect investments in *utilities engaged in interstate commerce* are:

Wisconsin Electric Power Company: An electric utility company which, with its subsidiaries, operates in and around Milwaukee and to the north, including an area in the upper peninsula of Michigan. Petitioner's investment, which consists of 94% of the common stock, commenced in 1890 (R. 838-9, 2832; SEC Holding Company Act Release 2950).

Union Electric Company of Missouri: An electric utility company which, with its subsidiaries, operates in and around St. Louis, Missouri, including adjacent Illinois territory. Petitioner's investment, which consists of all of the common stock, commenced in 1901 (R. 91, 92). Petitioner also directly owns all of the stock of The St. Louis County Gas Company, a relatively small company which furnishes gas service in St. Louis County, a suburban county in Missouri, which does not include the city of St. Louis (R. 1870).

Washington Railway and Electric Company: A holding company which holds all of the common stock of Potomac Electric Power Company, an electric utility company which serves the District

of Columbia and an adjoining area in Maryland, and of a minor company which serves a small adjacent area in Virginia, together with 50% of the capital stock of Capital Transit Company, which furnishes street car and bus service in the District of Columbia. Petitioner's investment, which consists of 80% of the common stock, commenced in 1924 (R. 132-4, 2826).

North American Light & Power Company: A holding company which holds stocks of electric utility companies and gas utility companies operating in Kansas, Missouri, Illinois and Iowa. This holding company is in process of dissolution; and petitioner will eventually receive such proceeds of liquidation as are applicable to its holdings of securities of various classes. This investment commenced in 1926 (R. 139, 2826).

Petitioner's investments in *utilities not engaged in interstate commerce* are:

The Cleveland Electric Illuminating Company: An electric utility company which serves Cleveland and the surrounding area. Its business is confined within Ohio. Petitioner's investment, which consists of 79% of the common stock, commenced in 1922 (R. 327, 646-50, 2826).

✓ *Pacific Gas and Electric Company:* An electric utility company which, with its subsidiaries, operates in and around San Francisco and to the north. Its business is confined within California. Petitioner's ownership, which consists of 33% of the

common stock, represents an investment which started in 1925 (SEC Holding Company Act Release 2988).

The Detroit Edison Company: An electric utility company which serves Detroit and the surrounding area. Its business is confined within Michigan. Petitioner's investment, dating from 1903, which at the time of commencement of the proceedings consisted of 19.2% of the capital stock, now consists of approximately 2% of the capital stock (R. 93; SEC Holding Company Act Release 4056).

Petitioner's investment in *non-utilities engaged in interstate commerce* is:

West Kentucky Coal Company: A company which owns and operates coal mines in Kentucky and sells coal, partly through subsidiary selling companies, in several States. Very little of this company's coal has been sold to utility companies in which petitioner holds investments. Petitioner's investment, which consists of most of the preferred stock and 100% of the common stock, commenced in 1905 (R. 123, 2858).

Petitioner's investments in *non-utilities not engaged in interstate commerce* are:

North American Utility Securities Corporation: A relatively small investment company. Petitioner's interest, which consists of all of the preferred stock and 80% of the common stock, commenced in 1924 (R. 119, 120).

60 Broadway Building Corporation. A company whose only asset is the office building in New York where petitioner has its offices. Petitioner's investment, which consists of 100% of the capital stock, commenced in 1924 (R. 121, 122).

Miscellaneous investments covered by the order also include:

\$120,000 of 5% Notes of Capital Transit Company.

4,700 shares of preferred stock of Illinois Iowa Power Company.

An investment of \$400,000 in Milwaukee Light, Heat & Traction Company whose sole assets are real estate held for liquidation and stock of a small electric furnace enterprise (R. 1507-8).

It will be noted from the foregoing summary that petitioner's investments have been continuous and are of long standing. In making and retaining its investments in the Wisconsin, St. Louis, Cleveland, Washington, Detroit and California areas, petitioner has long followed a policy of diversification which has proved sound and of substantial value to its securityholders (R. 2831-2, 3013-4).

Petitioner has at no time engaged in the business of managing the operations of its public utility operating subsidiaries, or selling them supplies, engineering services or the like. Its relationship has, essentially, been that of a large investor seek-

ing to promote the sound development of his investment. Petitioner has consistently proclaimed and practiced the policy of local autonomy for each public utility operating company and has sought to use its voting power to assure good local management which has had the genuine responsibility of conducting operations. Petitioner has furnished financial advice and assistance and sponsored the interchange of valuable operating information among the subsidiaries (R. 100-1, 2903, 2922).

Petitioner has been conservatively financed and its financial practices have been sound. There has never been a default on any security issued by petitioner (R. 2815, 2869-70, 2892-3). Residential electric rates charged by petitioner's operating utility subsidiaries are far below the national average and among the lowest in the country (Petitioner's Exhibits 124, 141, R. 3284, 3310).

Petitioner itself has accepted the strictest and most comprehensive regulation by the Commission, while its utility subsidiaries have been completely regulated for many years by the respective State commissions.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 11(b)(1) of the Act is within the power of Congress to regulate commerce among the several States.

2. In holding that Section 11(b)(1) of the Act is not violative of the Fifth Amendment to the Constitution.

REASONS FOR GRANTING THE WRIT

(1) This case presents Federal questions of great importance which have not been, but should be, settled by this Court.

The orders of the Commission and the decree of the Court below affirming those orders hold that the statute requires the divestment of the greater part of petitioner's assets. As thus interpreted and applied, the statute will require many public utility holding companies to divest themselves of assets, and will cause hardship to many stockholders.

The questions of the constitutionality of Section 11(b)(1) of the Act should, therefore, be reviewed by this Court. They present Federal questions of great public importance which should be and have not heretofore been passed upon by this Court. This Court has had before it on two prior occasions suits involving the constitutionality of the Act and has expressly reserved passing upon the constitutionality of Section 11(b)(1).

In *Landis, et al. v. The North American Company*, 299 U. S. 248 (1936), this Court had before it the action of the District Court for the

District of Columbia in staying the suit brought by petitioner to enjoin enforcement of the Act against it. There was not involved in that review the question of the constitutionality of Section 11(b)(1). However, this Court said (p. 256) that the questions arising in suits to resist enforcement of the Act were "of extraordinary public moment" which presented "grave issues" and "novel problems of far-reaching importance to the parties and the public".

In *Electric Bond & Share Company, et al. v. Securities and Exchange Commission, et al.*, 303 U. S. 419 (1938), the Commission sought to compel the petitioners there to register under the Act, and in a cross-bill the petitioners sought to enjoin enforcement of the Act against them. This Court, in requiring the petitioners to register, held that the registration sections of the Act were separable and expressly reserved questions concerning the constitutionality of the provisions of the Act other than the registration sections. This Court said:

"It is evident that the provisions of §§ 4(a) and 5 are not so interwoven with the other provisions of the Act that there is any inherent or practical difficulty in the separation and independent enforcement of the former while reserving all questions as to the validity of the latter. * * * If this decree is affirmed, it will constitute a specific adjudication that registration will be without prej-

udice to future challenge of the validity of any provision of the Act, or requirement of the Commission, outside of §§ 4(a) and 5." (pp. 434-435)

(2) The decision of the Court below does not give proper effect to the applicable decisions of this Court defining the power of Congress under the Commerce Clause.

The assets of which petitioner is ordered to divest itself consist wholly of securities of other corporations. The ownership of securities does not of itself constitute engaging in interstate commerce.

An intrastate matter, such as the ownership of securities, is not within the reach of the Federal power unless it so affects matters which are interstate that its control is necessary to protect the latter. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110 (1942). However, in such case there must be a specific finding that interstate commerce is affected. And this finding must be made by the Court, the Commission, or Congress. *United States v. Darby*, 312 U. S. 100 (1941).

In the case at bar, the Commission concededly made no finding that the ownership of the securities of which it ordered the petitioner to divest itself, or the ownership of any of them affected interstate commerce. The Circuit Court made none. It affirmed the orders of the Commission on the

theory that Congress itself had made the necessary findings. However, the only general finding that Congress made* is that public utility holding companies are affected "with a national public interest". Such a finding is insufficient as a basis for Federal jurisdiction under the commerce power. True, Congress declared* that the activities of public utility holding companies "often" affected interstate commerce, but that is not tantamount to a general finding that interstate commerce is affected merely by holding company ownership of securities in other corporations. It is at best a contingent finding that certain unspecified activities of some holding companies affect interstate commerce. To bring the orders of the Commission within the reach of the Federal power, this Congressional finding would have to be supplemented by findings that the petitioner's ownership of securities in other corporations sufficiently affects interstate commerce. No such findings were made by the Commission or the Court below; and the Act contains no provision authorizing either the Commission or the Court to make any such findings.

The statute involved in *Wickard, et al. v. Filburn*, 317 U. S. (November 9, 1942), was of a wholly different character from the Act here in question. It was an amendment to the Agricul-

*Section 1 of the Act.

tural Adjustment Act of 1938, Title III of which declared a policy and provided machinery for the regulation of interstate and foreign commerce and the prevention of burdens thereon by comprehensive regulation of the supply of basic agricultural commodities, including wheat. (See declaration of policy introducing the entire Act in Section 2, and the provisions of Title III containing general definitions (Section 301(a)(3) and (4), the legislative findings as to wheat in Section 331 and the provisions of Sections 335-339 regarding marketing quotas.) The question before this Court was simply whether, in view of the use to which Filburn put his wheat, his surplus could be said to affect interstate commerce sufficiently to make the application of the statute to him constitutional. In that case there was also a stipulation of the economic facts on the basis of which this Court found that the raising of wheat, for Filburn's own consumption, affected the marketing of wheat in interstate commerce. In the case at bar no such facts appear in the record, and it is necessary, if the Act is to be held within reach of the Federal power, that the ownership of securities as a matter of law affects interstate commerce.

(3) The decision of the Court below does not give proper effect to the applicable decisions of this Court under the Fifth Amendment.

The object which Congress sought to attain through the Act was the elimination of the enu-

merated "abuses".* The means selected were: (i) the far-reaching regulatory provisions of the Act other than Section 11, and (ii) divestment under Section 11. The petitioner contends that substantially all abuses are eliminated through the far-reaching regulatory sections of the Act other than Section 11. In view of this, the contribution which enforcement of that section would make to the Congressional purpose of eliminating abuses in the public utility field would be slight. It follows, we submit, that Section 11(b)(1) bears no such reasonable and substantial relation to the object sought to be attained as to be justified under the rule of *Nebbia v. New York*, 291 U. S. 502 (1934), cited by the Court below.

On the other hand, enforcement of Section 11(b)(1) would deprive petitioner of large properties and important property rights and inevitably visit upon it and its stockholders an enormous destruction of values. In *Wickard, et al. v. Filburn, supra*, the grounds upon which this Court upheld the legislation there involved against attack under the Fifth Amendment were that its apparently retroactive features were not actually such because "the penalty was contingent upon an act which appellee committed not before but after the enactment of the statute", and that the

*These so-called "abuses" are enumerated in Section 1(b) of the Act.

statute, along with the detriments complained of, conferred large benefits upon the appellee. This Court concluded:

"* * * That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law."

Neither of these grounds applies to Section 11(b)(1). Its operation is manifestly retroactive and neither that section nor the act as a whole confers upon petitioner any benefit to compensate for the deprivation of property which its enforcement would entail.

We submit that, in such a situation, the test of the *Nebbia* case is not satisfied and that the applicable authority is *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 589, 601-602 (1935).

(4) The decision of the Court below is in conflict with a decision of the Circuit Court of Appeals for the Fourth Circuit.

Under the opinion of the Court below Section 11(b)(1) of the Act is applicable to all registered holding companies which have not obtained exemption pursuant to Section 3(a) of the Act.

In this respect the opinion below is in ~~direct~~ conflict with the opinion of the Circuit Court of Appeals for the Fourth Circuit in the case of *Burco, Inc. v. Whitworth, et al.*, 81 F. (2d) 721 (1936) cert. den. 297 U. S. 724 which holds that the Act is invalid in so far as it applies to companies which are not engaged in interstate commerce, even though such companies do not seek exemption. This inconsistency, between the two Circuit Courts of Appeals, is not resolved by the case of *Electric Bond & Share Co. v. Securities and Exchange Commission, et al.*, 303 U. S. 419 (1938) since only the registration sections (Sections 4 and 5) of the Act were involved in that case.

CONCLUSION

Because of the importance of the Federal questions presented and for the other reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
Counsel for the Petitioner.

SULLIVAN & CROMWELL,
Attorneys for the Petitioner.

February, 1943

APPENDIX A

THE NORTH AMERICAN COMPANY

(SUMMARY OF INVESTMENTS HELD AT SEPTEMBER 30, 1942; BASED ON PETITIONER'S EXHIBIT 125 AND R. 2857, ADJUSTED TO REFLECT CHANGES TO SEPTEMBER 30, 1942)

	Number of shares or principal amount owned by The North American Company	Carrying value at September 30, 1942
Wisconsin Electric Power Company		
Preferred Stock	13,494 shs.	\$ 1,349,400.00
Common Stock	2,493,710 shs.	30,868,039.46
Union Electric Company of Missouri		
Common Stock	2,695,000 shs.	61,840,780.70
Acade Power and Light Company		
Common Stock Voting Trust Certificates		404,040.89
Mississippi River Power Company		
6% Preferred Capital Stock Scrip		62.63
Common Stock		22,522.00
The St. Louis County Gas Company		
Capital Stock	41,000 shs.	4,100,000.00
Washington Railway and Electric Company		
Common Capital Stock	50,197 shs.	10,272,456.27
Participating Units for Deposited Shares	65,233 ctf.	333,737.94
Capital Transit Company		
Capital Stock	3,012 shs.	274,093.92
5% Notes maturing serially from 1943 to 1946	\$120,000	120,000.00
North American Light & Power Company		
\$6 Preferred Stock	84,925 shs.	4,157,044.21
Common Stock	5,327,067 shs.	22,211,602.54
5½% Debentures, due July 1, 1956	\$5,623,500	3,791,211.94
Illinois Iowa Power Company (formerly Illinois Power and Light Corporation)		
5% Preferred Stock	4,700 shs.	155,795.13

THE NORTH AMERICAN COMPANY
(SUMMARY OF INVESTMENTS—Continued)

	Number of shares or principal amount owned by The North American Company	Carrying value at September 30, 1942
Common Stock	4,700 shs.	53,085.72
Dividend Arrears Certificates.....	4,700 ctfs.	56,547.50
The Cleveland Electric Illuminating Company		
Common Stock	1,847,908 shs.	38,417,339.00
Pacific Gas and Electric Company		
Common Stock	2,002,770 shs.	63,765,418.60
The Detroit Edison Company		
Capital Stock	297,894 shs.	7,268,084.70
West Kentucky Coal Company (N. J.)		
7% Cumulative Preferred Stock.....		3,801,350.50
Common Stock		10.00
North American Utility Securities Corporation		
Second Preferred Stock.....	60,000 shs. }	1,703,757.50
Common Stock	376,151 shs. }	
60 Broadway Building Corporation		
Capital Stock		350,000.00
Open Account		1,663,813.60
Milwaukee Light, Heat & Traction Company		
Capital Stock		400,000.00
Associated Music Publishers, Inc.		
Preferred Stock		450,000.00
3% Note due April 27, 1943.....		23,000.00
		<hr/>
		\$257,853,186.30